



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 1266 OF 2004(O.S)**

**1. NJANGO CHEGE.....1<sup>ST</sup> PLAINTIFF**

**2. RAPHAEL WAWERU CHEGE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**LAWRENCE WAMBAKI MUIRURI.....DEFENDANT**

**CONSOLIDATED WITH**

**ELC SUIT NO. 1301 OF 2005**

**LAWRENCE WAMBAKI MUIRURI.....PLAINTIFF**

**VERSUS**

**1. NJANGO CHEGE.....1<sup>ST</sup> DEFENDANT**

**2. RAPHAEL WAWERU CHEGE.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

I have before me two consolidated suits. The two suits involve the same parties and the same property known as L.R No. Ngenda/Mangu/134(hereinafter referred to as “the suit property”). The suit property was at all material times registered in the name of Lawrence Wambaki Muiruri who is the defendant in ELC No. 1266 of 2004(O.S) and the plaintiff in ELC No. 1301 of 2005. The plaintiffs in ELC No. 1266 of 2004(O.S), Njango Chege and Raphael Waweru Chege who are also the defendants in ELC No. 1301 of 2005 brought that suit against Lawrence Wambaki Muiruri seeking a declaration that they had acquired the suit property by adverse possession and an order that Lawrence Wambaki Muiruri be compelled to transfer the property to them. In ELC No. 1301 of 2005, Lawrence Wambaki Muiruri sought the eviction of Njango Chege and Raphael Waweru Chege from the suit property. The two suits were consolidated through an order made on 4<sup>th</sup> February, 2008 with ELC No. 1266 of 2004 as the lead file.

For ease of reference, I will hereinafter refer to Njango Chege and Raphael Waweru Chege only as “the Cheges” where the context so permits and Lawrence Wambaki Muiruri as “Muiruri”. ELC No. 1266 of 2004 was brought by way of an Originating Summons dated 5<sup>th</sup> November, 2004 which was amended on 1<sup>st</sup> December, 2006. In the amended Originating Summons, the Cheges averred that they started tilling the suit property in 1957 and that Njango Chege constructed a house thereon in 1975 while Raphael Waweru Chege constructed a house on the property in 1979. The Cheges averred that they had lived on the suit property from the time they constructed the said houses. They averred that they had acquired the property by adverse possession and that Muiruri’s title over the property had been extinguished by passage of time. Muiruri respondent to the Cheges’ amended Originating Summons through a replying affidavit sworn on 18<sup>th</sup> December, 2006 in which he stated that, at all material times, the Cheges occupied the suit property as licensees. He stated that the Cheges had agreed that they would either purchase the suit property or would give Muiruri a parcel of land known as L.R No. Ngenda/Mangu/23 (hereinafter referred to only as “Plot No. 23”) in exchange with the property. Muiruri stated further that in 2000, the Cheges offered to purchase the suit property at Kshs. 70,000/- which he rejected after which the parties agreed that the Cheges would enhance the price to Kshs. 150,000/- . Muiruri stated that the Cheges’ suit was brought for the purpose of defrauding him of the suit property.

ELC No. 1301 of 2005 was brought through a plaint dated 26<sup>th</sup> April, 2005 that was amended on 12<sup>th</sup> February, 2007. In the amended plaint filed on 13<sup>th</sup> February, 2007, Muiruri averred that he discovered in 1992 that the suit property was registered in his name. He averred that upon realising that he was the registered owner of the suit property, he permitted the Cheges to reside thereon on condition that they would

either purchase the property from him or would give him Plot No. 23 in exchange with the suit property. Muiruri averred that the Cheges occupied the suit property as mere licensees. He averred further that in 2000, Raphael Waweru Chege approached him and offered to purchase the suit property at Kshs. 70,000/- which offer was not acceptable to him. Muiruri averred that he made a counter-offer to Raphael Waweru Chege of Kshs. 150,000/-. Muiruri averred that Njango Chege who was the mother of Raphael Waweru Chege had indicated earlier that in case they were unable to purchase the suit property they would exchange it with Plot No. 23. Muiruri averred that the Cheges' adverse possession claim was fraudulent in that it was intended to enable the Cheges to acquire the suit property without either paying for it or handing over Plot No. 23 to Muiruri in exchange in lieu of payment. Muiruri sought judgment against the Cheges for; general damages, eviction from the suit property and in the alternative, and without prejudice, an order that the Cheges hand over and transfer to him Plot No. 23.

The Cheges filed a defence to Muiruri's claim on 24<sup>th</sup> November, 2005 which was not amended when Muiruri amended his plaint. In the defence, they denied Muiruri's claim in its entirety. The Cheges denied that they occupied the suit property with Muiruri's permission and that they had agreed to either purchase the suit property from Muiruri or to give Muiruri Plot No. 23 in exchange with the property. The Cheges also denied that they had offered to purchase the suit property at Kshs. 70,000/- or at any other price. The Cheges averred that if there was any agreement between them and Muiruri for the sale of the suit property which they denied, the same was illegal as it was not reduced into writing as required by law. The Cheges also denied that their adverse possession claim was fraudulent.

At the hearing Raphael Waweru Chege (PW1) told the court that the Cheges started using the suit property in 1957 soon after the land was demarcated. He stated that Muiruri had never used the suit property and had never asked them to vacate. He stated that they had built two houses on the suit property one in 1975 and the other in 1979. He told the court that he had connected electricity and piped water to the suit property. He stated that Plot No. 23 was only registered in his name on 1<sup>st</sup> October, 2003. He denied that they had at any time discussed the purchase of the suit property or exchange of the same with Plot No. 23. In cross-examination, PW1 reiterated that they had never entered into negotiations with Muiruri to purchase the suit property neither did they agree on exchange of the suit property with Plot No. 23.

After the close of the Cheges' case, Muiruri called his wife, Regina Gatete Wambaki(DW1) as his first witness. DW1 told the court that although the suit property was all along registered in the name of Muiruri, it was in 2000 that they came to know of that fact. She stated that after they discovered that the suit property was registered in the name of Muiruri, the Cheges approached them and they offered to sell the property to them. She stated that the Cheges did not come back to them on the issue. In cross-examination, DW1 stated that they had never used the suit property and that the Cheges had constructed houses and were residing on the property. DW1 also admitted that they had never demanded that the Cheges vacate the property. DW1 stated that the Cheges had offered to purchase the suit property at Kshs. 70,000/- but the offer was not accepted by them. She stated that they had also agreed on exchange but one of the Cheges refused the arrangement.

Muiruri was the last witness. He told the court that he was the owner of the suit property and that he did not know the location of the property until he obtained the information at the land registry in 1987. He stated that when he came to know of the location of the suit property, the same was already occupied by the Cheges. He stated that the Cheges asked him if he could sell the property to them. He stated that after about 3 years, the Cheges came and offered to purchase the suit property at Kshs. 70,000/-. He stated that the Cheges did not come back. In cross-examination, Muiruri stated that he came to know of the suit property in 1981 and that he was staying about 1 Kilometer from the property. He stated that he had sent the village headman to ask the Cheges to vacate the suit property. He stated further that they had at one time agreed with the Cheges to exchange the suit property with a parcel of land that was owned by the Cheges but he was no longer interested in the same. When interrogated further on the issue, he stated that there was no agreement reached on exchange. He stated that the Cheges offered to purchase the suit property around 1981 and that they did not enter into a written agreement. He stated that the discussion was oral and that the agreement would have been reduced into writing if he had been paid.

After the close of Muiruri's case, the parties made closing submissions in writing. The Cheges filed their submissions on 9<sup>th</sup> April, 2015 while Muiruri filed his submissions on 8<sup>th</sup> April, 2015. The Cheges submitted that Muiruri was indolent in pursuing his rights and that his claim to recover the suit property from them was time barred. The Cheges submitted that an adverse possession claim is not unconstitutional. In support of this submission, they cited Kahindi Ngala Mwangandi v Mtana Lewa [2014] eKLR in which the court stated that it is against public interest and the constitution to allow land, a scarce resource to lie idle abandoned in perpetuity. The Cheges also cited Njuguna Ndatho v Masai Itumo & 2 others [2002]eKLR in which the court stated that for a defence of adverse possession to succeed, the possessor(s) must show that the possession was adequate, continuous and exclusive which means that the possession must be adequate in continuity, in publicity and in extent to show that the possession was adverse to the proprietor. The Cheges submitted that their possession of the suit property had met the threshold for adverse possession. The Cheges submitted that they took possession of the suit property without Muiruri's permission and that they had occupied the same for the statutory period. The Cheges reiterated that they had never entered into negotiation with Muiruri to purchase the suit property or to exchange the same with Plot No. 23 which at the material time belonged to Raphael Waweru Chege's father. They submitted that even if it was assumed that there was such negotiation, the same was said to have taken place in 1992 and that over 12 years had lapsed from that date by the time Muiruri brought a suit in 2005 to recover the suit property from them. The Cheges submitted further that even if there was an agreement between the parties, the same was not reduced into writing in accordance with section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya and as such the same was invalid.

The Cheges submitted that they had occupied the suit property for a very long time and as such it would serve the interest of justice if they were declared to have acquired the suit property by adverse possession. On Muiruri's claim, the Cheges reiterated their submissions on the purported agreement which they were alleged to have entered into with Muiruri to either purchase the suit property or to exchange it with Plot No. 23. They submitted that the purported agreement could not support Muiruri's claim. The Cheges submitted that Muiruri's claim had no basis and urged the court to enter judgment for them as prayed in the Originating Summons and to dismiss Muiruri's suit.

In his submission, Muiruri reiterated that he was the owner of the suit property having acquired the same in 1981. Muiruri submitted that after identifying the location of the suit property, he allowed the Cheges to continue in occupation since Njango Chege was a friend to his wife. Muiruri reiterated that the Cheges were mere licensees on the suit property. He submitted further that the Cheges had agreed to exchange their Plot No. 23 which was near Muiruri's residence with the suit property and subsequently offered to purchase the property. Muiruri submitted that the Cheges were unable to raise the price that he had asked for and that their inability to exchange Plot No. 23 with the suit property was due to the fact that Plot No. 23 was at the material time registered in the name of Chege Waweru, deceased who was the father of Raphael Waweru Chege and the husband of Njango Chege.

Muiruri submitted that for the purposes of Limitation of Actions Act, Chapter 22 Laws of Kenya, time for recovering the suit property could only start running from the year 2000 when the Cheges made an offer to purchase the suit property at Kshs. 70,000/- which was rejected by him and the Cheges failed to accept his counter offer of Kshs. 150,000/-. Muiruri submitted that up to 2000, the Cheges occupied the suit property as licensees. Muiruri submitted that the Cheges claim for adverse possession was not proved because their occupation of the suit property was interrupted by the permission that Muiruri gave them to occupy the property. In support of his submissions, Muiruri cited Ann Itumbi Kiseli v James Muriuki Muriithi[2013]eKLR and Kweyu v Omuto[1970] KLR 709.

Muiruri died in September, 2016 while this matter was pending judgment. On 26<sup>th</sup> November, 2019, the administrators of Muiruri's estate, Regina Gatete Wambaki, John Kibugi Wambaki and Edward Muiruri Wambaki were substituted as parties in the consolidated suits in place of Muiruri, deceased. I have considered the Originating Summons by the Cheges together with the affidavits filed in support thereof. I have also considered the evidence that was adduced in support of the reliefs sought therein. I have also considered the claim by Muiruri and the evidence that was tendered in support thereof. I will consider the Cheges' claim first because it was first in time and also if it succeeds, it will dispose of Muiruri's claim. In Salim v Boyd and Another [1971] E.A. 550, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted occupation of the land for a period of 12 years or more. In Kimani Ruchine & Another v Swift, Rutherford Co. Ltd. & another [1977] KLR 10 Kneller J. stated as follows at page 16;

**“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, necpccario (no force, no secrecy, no evasion) .....The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”**

In Wambugu v Njuguna [1983] KLR 172 the Court of Appeal stated as follows:

**“First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The Limitation of Actions Act (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”**

In Dr Ojienda's, Principles of Conveyancing Hand Book, Law Africa Vol II at page 97 the author has stated that:

**“Where the claimant is in possession of the land with leave and licence of the true owner in pursuance of a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission the occupation can only be either with permission or adverse, the two concepts cannot co-exist.”**

In Jandu v Kirpal [1975] E. A 225 Chanan Singh J. stated that:

**“The rule on ‘permissive possession’ is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land”.**

In Wilson Kazungu Katana & 101 Others v Salim Abdalla Backshwen & another [2015] e KLR, the Court of Appeal cited with approval its decision in the case of Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001(UR), where it had stated that:

**“..it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in (accordance with) provisions of an agreement of sale lease or otherwise. Further as the High Court correctly held in Jandu vs. Kirpal [1975] E.A.225 possession does not become adverse before the end of the period for which permission to occupy has been granted....”**

In Githu v Ndeete [1984] KLR 776 it was held that:

**“Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.”**

It is on the foregoing principles that the Originating Summons before me falls for consideration. The following facts are not in dispute. Muiruri is the registered owner of the suit property. He was registered as the owner of the property on 24<sup>th</sup> August, 1981. Muiruri was not aware of the location of the suit property until 1992. When Muiruri came to know of the location of the suit property, the Cheges were already in occupation of the same and had put up residential buildings thereon. As at 24<sup>th</sup> November, 2004, when the Cheges filed ELC No. 1266 of 2004 seeking to be declared the owners of the suit property by adverse possession, they were still in occupation of the suit property. ELC No. 1266 of 2004 was filed after 12 years from the time Muiruri got to know that he was the owner of the suit property. From the letter by the Ministry of Lands dated 2<sup>nd</sup> September, 1992 that was produced by Muiruri in evidence, Muiruri came to know the location of the suit property on or about 18<sup>th</sup> September, 1992 when the parties appeared before the Land Registrar at Kiambu. The Cheges' occupation of the suit property was open and was known to Muiruri. Even after knowing that the land that was occupied by the Cheges belonged to him, Muiruri took no action to have them vacate the property. Muiruri came to court to seek orders for the eviction of the Cheges from the suit

property on 27<sup>th</sup> October, 2005 in ELC No. 1301 of 2005; more than 12 years after he became aware that they were in occupation of his property.

The main issue that is disputed is whether the Cheges had offered to purchase the suit property from Muiruri or to give him Plot No. 23 in exchange for the suit property. The other issue in dispute is whether the Cheges were occupying the suit property with Muiruri's permission and as such were his licensees. If the Cheges had made such offer to purchase the suit property, that would have amounted to acknowledgment of Muiruri's title to the suit property and would have stopped time from running for the purposes of limitation of actions as was held in Githu v Ndeete (supra). Again, if the Cheges were occupying the suit property with Muiruri's permission then they were licensees in whose favour time could not run for the purposes of adverse possession until the licence was terminated.

The burden was upon Muiruri to prove that the Cheges had offered to purchase the suit property and had agreed that if they were unable to raise the purchase price, they would transfer to him Plot No. 23 in exchange with the suit property. Muiruri had the same onus of proof with regard to his claim that the Cheges were occupying the suit property with his permission. The evidence that was given by Muiruri and his witness DW1 on the issue of the offer that was allegedly made by the Cheges was not consistent. In his affidavit in response to the amended Originating Summons in ELC No. 1266 of 2014, Muiruri stated that after discovering that he was the owner of the suit property, he allowed the Cheges to continue residing thereon on condition that they would either purchase the same or would give him Plot No. 23 in exchange therewith. Muiruri stated further that in 2000, the Cheges made an offer to purchase the suit property at Kshs. 70,000/-. He stated that he rejected the offer and made a counter offer of Kshs. 150,000/- which was accepted by the Cheges. In his plaint filed in ELC No. 1301 of 2005, Muiruri reiterated what I have stated above save that he did not state that the Cheges had accepted his offer to sell the suit property to them at Kshs. 150,000/-.

In his witness statement dated 13<sup>th</sup> December, 2011 filed in ELC No. 1266 of 2004 that he adopted at the trial as his evidence in chief, Muiruri claimed that after it was confirmed at the Land Registry at Kiambu in 2000 that the suit property belonged to him, he asked the Cheges to vacate the suit property and that the Cheges requested to be allowed to purchase the property. Muiruri stated further that the Cheges thereafter offered to pay Kshs. 70,000/- for the property which he asked them to enhance to Kshs. 150,000/-. Muiruri stated that the Cheges agreed to give him Plot No. 23 in exchange with the suit property in case they were unable to raise the purchase price of Kshs. 150,000/-. In his oral testimony in court, Muiruri stated that he discovered that he owned the suit property in 1987 and that three years thereafter, the Cheges came and offered to purchase the suit property at Kshs. 70,000/- after which they never came back. Muiruri's claim that he knew of his ownership of the suit property in 1987 was inconsistent with his pleadings and witness statement in which he had given different dates. In cross-examination, he claimed that he knew of the suit property in 1981. With regard to the agreement to exchange the suit property with Plot No. 23, Muiruri's last word was that they did not enter into any such agreement.

In her witness statement of the same date which she also adopted at the trial as her evidence in chief, DW1 reiterated the contents of Muiruri's statement with regard to the offer that had been made by the Cheges to purchase the suit property. DW1 added however that when Muiruri gave a counter offer of Kshs. 150,000/-, the Cheges promised to consider it and come back with a final offer and that she was the one who had suggested that the Cheges give Muiruri Plot No. 23 that was next to their residence in exchange with the suit property. In her evidence in cross-examination, DW1 told the court that she could not remember when the Cheges agreed to purchase the suit property or to exchange the same with Plot No. 23. She stated that an agreement was reached but the Cheges did not make the payment. This evidence conflicted with what she had stated in her witness statement. In re-examination, she stated that the sale collapsed.

From the pleadings, affidavits, witness statements and oral evidence tendered in court, I am not satisfied that the Cheges made an offer to purchase the suit property from Muiruri or to give Muiruri Plot No. 23 in exchange with the same. A part from what Muiruri and his witness told the court, no documentary evidence was placed before the court of the alleged offer and subsequent agreement. As was rightly submitted by the Cheges, section 3(3) of the Law of Contract Act provides that an agreement for the disposition of an interest in land must be in writing, signed by the parties and witnessed. Any agreement falling short of those requirements cannot be enforced by the court. Due to the foregoing, it is my finding that Muiruri did not establish that the Cheges had offered to purchase the suit property or to transfer to him Plot No. 23 in exchange with the suit property. On the claim by Muiruri that the Cheges occupied the suit property with his permission, no evidence was produced in proof of the same. In his evidence in cross-examination, Muiruri claimed that he had sent a village headman to ask the Cheges to vacate the suit property. I wonder why he would do that if he had permitted them to remain in occupation. I am not satisfied therefore that the Cheges were Muiruri's licensees on the suit property.

Due to the foregoing, it is my finding that the Cheges occupied the suit property without Muiruri's permission and that their occupation was not interrupted either by Muiruri's assertion of his right over the property or by their admission of Muiruri's title. The Cheges therefore occupied the suit property openly, continuously and with the knowledge but without the permission of Muiruri for a period of over 12 years. I am satisfied that the Cheges have established their adverse possession claim over the suit property and that they are entitled to the reliefs sought in the Originating Summons.

With regard to Muiruri's claim in ELC No.1301 of 2005, the same cannot succeed in view of the findings that the court has made in the Cheges' claim in ELC No. 1266 of 2004. The court has already made a finding that as at 22<sup>nd</sup> November, 2004 when the Cheges brought their suit against Muiruri claiming the suit property by adverse possession, Muiruri's claim over the property was already time barred and as such his rights in the property had become extinguished. Muiruri's claim in ELC No. 1301 of 2005 is therefore time barred and not maintainable in law. Muiruri had raised an alternative claim based on the alleged agreement to exchange the suit property with Plot No. 23. I have already found that the existence of that agreement was not established by Muiruri. In the circumstances, Muiruri is not entitled to any of the reliefs sought in his amended plaint in ELC No. 1301 of 2005.

In the final analysis and for the foregoing reasons, I hereby make the following orders:

1. I declare that Njango Chege and Raphael Waweru Chege, the plaintiffs in ELC No. 1266 of 2004, have acquired L.R No. Ngenda/Mangu/134 by adverse possession.
2. The administrators of the estate of Lawrence Wambaki Muiruri, the defendant in ELC No. 1266 of 2004, shall execute the

instrument of transfer and any other document that may be necessary for the effective transfer of L.R No. Ngenda/Mangu/134 to Njango Chege and Raphael Waweru Chege.

3. In the event that the administrators of the estate of Lawrence Wambaki Muiruri fail or refuse to transfer L.R No. Ngenda/Mangu/134 to Njango Chege and Raphael Waweru Chege, the Deputy Registrar of this shall be authorised to execute the instrument of transfer and any other document that may be necessary for the transfer the said parcel of land to Njango Chege and Raphael Waweru Chege.

4. Njango Chege and Raphael Waweru Chege shall meet the statutory charges and other expenses associated with the transfer of L.R No. Ngenda/ Mangu/134 to them.

5. ELC No. 1301 of 2005 is dismissed.

6. Each party shall bear its own costs of the two suits.

**Delivered and Dated at Nairobi this 5<sup>th</sup> Day of May 2020**

**S. OKONG'O**

**JUDGE**

**Judgment read through Microsoft Teams Video Conferencing platform in the presence of;**

N/A for the Plaintiffs

N/A for the Defendant

Ms. C. Nyokabi-Court Assistant